MISCELLANY.

Conflict of Laws—Comments on Poole v. Perkins.—The case of Poole *v.* Perkins, 101 S. E. 240, digested on page 182 of this number, is one full of interest for the theory and practice of the conflict of laws. The Yale Law Journal (Vol. XXIX, No. 5), in referring to this case, makes the following comments:

The reasoning of the court was notably full and able.

It is established by the cases that incapacity for coverture imposed by the *lex domicilii* is a purely local protection covering only locally made contracts and suits in local courts; that a contract otherwise valid, if "made" in a state where women have capacity is valid everywhere, save where the policy of the forum forbids its enforcing such contracts; and that this holds true even where the contracting married woman remained physically in the state of her domicile, and only "made" the contract in another state by agent or by letter. The conclusion generally drawn is that the place of entering into the contract governs capacity to make commercial contracts, as it does in this country capacity to contract marriage. The principal case, dealing with a contract made in the state of domicile, now aligns itself with those minority decisions and *dicta* which treat the law of the place of performance as, in the absence of other indication, the law intended by the parties to govern the contract; which give legal effect to that intention; and which subject to that law not merely questions of validity and interpretation, but the determination of capacity to contract as well.[1] This illustrates anew the marked tendency of our courts to find a single law to govern all aspects of any one transaction; from that angle alone the decision is worth note. But its striking feature is found in the direct challenge of its reasoning to the territorial theory on which most of our discussion of conflict of laws has been based.

It has been repeatedly demonstrated that to subject the question of capacity to the intention of the parties is incompatible with any theory of territorial validity of law.[2] Capacity involves a person's

1. There remains the possibility that form may be governed by the law of the place of making. The court in the instant case expressly avoids passing on that.

2. (1918) 27 Yale Law Journal, 818; Parmelee in 26 L. R. A. (N. S.) 764 and L. R. A. 1916A 1058; Lorenzen, Conflict of Laws Relating to Bills and Notes (1919) 72. Cf. the admirable statement of territorial theory quoted in the opinion from Minor, Conflict of Laws (1901) 410:

"The only law that can operate to create a contract is the law of the place where the contract is entered into (*lex celebrationis*). If the parties enter into an agreement in a particular state, the law of that state alone can determine whether a contract has been made. If by the law of that state no contract has been made there is no

contract. Hence, if by the *lex celebrationis* the parties are incapable of making a binding contract, there is no contract upon which the law of any other state can operate. It is void ab initio."
legal power to have an intention which is legally effective. Capacity must therefore be conferred by some system of law, before the intention to subject the contract to the law of the place of performance can become legally operative. But if a married woman domiciled in Tennessee, and concluding her contract within Tennessee's borders, can project herself by mere intention into capacity in Virginia; and if, as we may fairly assume, the courts of Tennessee would not recognize such capacity in a suit on the contract brought against her in Tennessee—then she is deriving her capacity from a law with which she has no personal or territorial connection. If the law of Virginia is operating to give her that capacity, it is operating outside Virginia's borders, on a person not shown ever to have been in Virginia or "subject to Virginia law" up to the time of contracting. And when the courts of Virginia enforce the contract against her, as they have, it must be because they accord her the capacity, even while she is in Tennessee, to bind herself contractually by acts done in Tennessee.[3]

The Journal has taken the position, and sees little reason to depart therefrom, that there are good reasons in policy for choosing the place of making to govern capacity to make a commercial contract. Those reasons apply, indeed, much less forcibly, if at all, to contracts made by correspondence, where the place of "making" is largely dependent on chance. And if a woman can secure herself contractual capacity by merely posting a letter or sending an agent into another jurisdiction, there is little cause to refuse her power to accomplish the same result by writing into the contract a properly chosen place of performance. This the principle case well brings out. Perhaps the most commercially advantageous solution would be an alternative rule: if one has capacity either by the law of the making or by the law of the performance, the contract is good in that particular.[4] But whichever of these rules be

3. The careful reasoning of the Virginia court would lead to the same result, if the place of performance selected by the defendant had been New York; and it is believed that the same result would have been reached in such a case. To be sure, the general principles laid down are sharply weakened, as in so many conflict cases, by the fact that they lead squarely—as so often in the "intention" cases—to the application of the forum's local law. Only a decision in which the forum rejects its own local law has full value as a precedent. But while this may weaken the case as an authority for the contract doctrine involved, it does not impair its cogency as an illustration of the inadequacy of the territorial theory to explain the facts.

4. Lorenzen, Conflict of Laws Relating to Bills and Notes 80; Dulin *v.* McCaw (1894) W. Va. 721, 20 S. E. 681; Wharton, Conflict of Laws (3d ed. 1905), §§ 102, 104.

favored, the instant case retains its vital significance. It can be explained in one way only: by recognition that it is the forum which picks the system of law which is to govern a given incident of a transaction, and which thereby incorporates the local rule of that system into itself, as its own rule for the transaction at bar, thus at bottom applying in every case its own law to rights of its own creation.

Trade Acceptances.—Acceptances usually specify the bank at which they are payable. The Negotiable Instrument Act makes an acceptance which is payable at a designated bank a legitimate charge against the account of the customer on the date the acceptance matures, should there be sufficient funds in the customer's account. The authority for the bank is the same as that of a check, since the acceptance of the amount by the customer, and his statement that it is payable at that partic lar bank properly authorize the holder of the instrument to demand payment of the funds from the bank named therein, just as he would if he held the acceptor's check.

The acceptance should be entered in the usual collection register, noting the date of maturity, name of bank at which it is payable, name and address of acceptor, etc., as well as any special instructions. On the date of maturity the item should be charged to the acceptor's account, if this is kept with the bank holding the item for collection; if not, it should be sent out by messenger or runner and presented for payment at the bank at which it is payable. Should payment be refused for any reason and the instructions are to protest the item in case of nonpayment, the instructions should be carried out just as in the case of a check, and the item returned immediately; if the instructions are "No protest," the remitting bank should be notified immediately of the reasons for nonpayment and the itom held for further instructions or returned at once, as the case may require, in the opinion of the collection manager, unless specific instructions to a certain effect accompany the item. Particular notice should be taken of items on which telegraphic advice of fate is requested, and such instructions should be carried out to the letter. The schedule of charges on acceptances received and entered for collection should be: Service to correspondent banks, free; other banks, 1 per cent; customers other than banks, 25 cents for the first hundred or fraction; 15 cents per hundred or fraction for the succeeding four hundreds; 10 cents per hundred or fraction for all hundreds above five hundred dollars.

It should be emphasized that these charges do not represent any special collection fee or exchange for the transfer of funds, as the use of trade acceptances should be encouraged as much as possible, and in order to attain this end, no special collection charge or exchange for transfer of funds would be desirable, the above schedule

representing only a close estimate of the actual expense in the way of postage, stationery, clerical help, etc., which would be incurred by the bank collecting the item. This being the case, and as the face value of the acceptance should, properly, be net to the holder, the expense entailed with its collection should be borne by the acceptor. Some controversy has come up as to who should stand the charge made by the collecting bank; and in this connection it would be well to state that the amount of those charges does not represent exchange for the transfer of funds, nor special collection service fees, which, if such were the case, should be borne by the seller or maker or the holder of the acceptance, since the acceptor has fulfilled his part of the contract by making the funds available for the holder at the bank where the acceptance is made payable, and it would be up to the holder or maker to stand any expense involved in having the funds transferred to his own bank or place of residence; but as the charges made represent only the actual expense incurred by the collecting bank in collecting the item for the maker or holder, this expense should, properly, be borne by the acceptor, as his funds could not be made available at his own bank without incurring it.

The first step when an acceptance is presented to the bank for sale or discount is the analysis of the credit risk involved. There are two contentions as to the proper market for the trade acceptance, namely, the place of residence of the maker or seller, and that of the acceptor. In the first of these cases the Credit Department of the bank buying it or discounting the acceptance will encounter greater difficulty in securing all the desired information regarding the responsibility of the acceptor, although, if the maker or seller be a manufacturer, a jobber, or any other client of the bank of well-established credit standing, a fair security to the bank is obtained by the indorsement of the maker. Another objection to the marketing of the acceptance at the place of residence of the seller is that the financing has to be done by the community selling the goods and not by that which consumes them, which in all events would be more desirable. By placing the acceptance with the acceptor's bank, the latter is in a better position to determine the credit standing and responsibility of the acceptor, and therefore will be making no mistake in taking the paper offered readily, or rejecting it altogether, as the case may require. It will also place the burden of financing the transaction on the consuming community and give the home banker of the acceptor the opportunity to earn the discount.

There are two ways in which an acceptance may be taken into the bank: by purchase at full face value, interest to be computed and charged at the time the acceptance is paid, or by discount. The rate of interest or discount to apply is in most cases determined by the eligibility of each item, which may be classed as A-1 commercial paper or may be refused altogether. Conditions prevailing in the

money market and the maturity dates of the items are also determining factors in establishing the rate which is to be applied to the paper offered.

If the amount of acceptances bought or discounted by the bank is not too great, the items can be handled individually, in the same manner as any other paper found in the portfolio; however, if the business along this particular line is considerable and the amount of acceptance is great, the following plan can be made to apply, and although the method may be modified for adaptation to each particular bank, the same general principles should govern. When the customer offers trade acceptances for sale or discount, the total amount of same is entered on the offering book, and the customer's account on the books of the bank is credited with that amount. Each customer offering any quantity of trade acceptances is given a number, and the customer's number is placed on the reverse of the acceptance for reference, and thereafter the item should be referred to that number. Trade acceptances purchased at any time from this customer are entered in the space provided in the liability ledger, which is arranged to include all necessary data. If the customer should be offering his own paper at the time he is discounting acceptances. care should be taken to show at all times his direct and contingent liability separately. Having been so listed, these trade acceptances are delivered to the Collection Department for collection, the latter forwarding them to various places of payment. As each item is paid or returned, the Collection Department should account for it to the Discount Department. Paid acceptances are credited to the Trade Acceptance Account, and those returned are charged against the customer's account and on the liability ledger kept in the Discount Department. This method gives the outstanding balance daily for each customer, and at the end of the month running interest on the daily outstanding balance of trade acceptances is charged against the account of the customer, together with charges incidental to the collection of the items. Each item in its course of handling should be designated by its number, as above stated. All items are entered in a special form, similar to the collection letter, bearing the instructions of the bank to its correspondent or collector. This form is made out in triplicate, the original being sent with the item for collection; the duplicate delivered to the Discount Department for record and to serve as an interdepartmental receipt for the item; the triplicate retained in the files of the Collection Department.

Discounting acceptances in great numbers would involve an enormous amount of detail work and place a great burden on the Discount Department; all of which is undesirable, as it would be too tedious and would make that particular kind of paper unpopular. The practical method of handling these items as described above, figuring running interest on outstanding balances of trade accept-

ances, would be better adapted to banks where acceptances are handled in great numbers, as the routine work would be greatly simplified. The loss which might result from the difference between per cent of profit per annum on money loaned on interest and funds advanced under discount, would be offset by the saving in time and labor and the increased capacity of the bank for handling this kind of paper.—A. E. Aviles in Personal Efficiency.

Drinks, Drinkers, and Drinking.*—The dry and thirsty days of summer are here once more. Drinking is the order of the day. Our bodies require to be constantly moistened internally, else with the thermometer among the nineties, quickly would the human form divine become little heaps of dust and ashes. If we cannot drink just now let us think about it. Longfellow says: "He who drinks beer, thinks beer; and he who drinks wine, thinks wine." Let us for a few minutes fondly imagine the converse of this to be true, and while we think of beer, cider, wine, and ale, let us drink in fancy. In dealing with this subject let us take the division suggested by Lindley Murray's definition of a noun, and speak of "person, place, and thing."

Then, firstly, as to the "person." A "common drunkard" is not a regular tippler, but one who is frequently drunk. Proof that one was drunk six times on six different days in three months, when there was no evidence of his state on the other days, does not entitle him to the presumption that he was sober on the other days. Com. *v.* McNamee, 112 Mass. 285. The rule of law is that things are presumed to continue in statu quo.

An "habitual drunkard" is one who has the habit of indulging in intoxicating drink so firmly fixed that he becomes drunk whenever the temptation is presented by his being near where liquor is sold. Magahy *v.* Magahy, 35 Mich. 210.

The phrase, "addicted to the excessive use of intoxicating liquors," means not the occasional excessive use, but the habitual excessive use. Mowry *v.* Home Ins. Co., 1 Big. Life and Acc. Ins. Co. Cases, 698.

A court being called on to define in an insurance case what was meant by saying that "a man had always been sober and temperate," very wisely concluded that such a thing could not be said of one who, although usually sober and temperate in his habits, yet occasionally indulges in drunken debauches, which sometimes end in delirium tremens. Mutual Benefit Life Ins. Co. *v.* Hotterhoff, 2 Cin. Sup. Ct.

To say that a man is "intemperate" does not necessarily imply that he is in the habit of getting drunk. Mullinex *v.* People, 76 Ill.

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*Interpolated without explanation and without credit of authorship in Kulp (Pa.) 183 (published in 1882) and now republished as a matter of historic interest.—Ed.

211. We fancy, however, the courts would not hold the converse of this.

A "saloon keeper" is one who retails cigars, liquor, et hoc genus omne. Cahill *v.* Campbell, 105 Mass. 60.

In England, one who on Sunday walked to a spa two and a half miles away from his home for the purpose of drinking the mineral water for the benefit of his health, and then took some ale at a hotel (to keep the water down, we suppose), was held by the Court of Common Pleas to be a "traveler." Pepler *v.* Richardson, L. R. 4 C. P. 168.

England is a small country; one cannot travel far in any direction without getting his feet damp, like Canute and his friends. We presume this is why what would here be called "taking a stroll" is there dignified by the name of "traveling."

In considering the question of selling liquor to a "minor," the court held that the fact that a youth wore a beard and said that he was twenty-one was no proof that he was an adult. Getty *v.* State, 41 Ind. 162.

The bench doubtless believed that, although every American boy may become President, still every one is not a George Washington; but that, as Mark Twain says, "Some Americans will lie." As to beards, nature occasionally "bursts out with a chintuft" before her turn, or where she should not.

Now as to "place." Judges do not exactly know—at least when on the bench—what a "saloon" is. They say that it does not necessarily import a place to sell liquors; that it may mean a place for the sale of general refreshments (Kelson *v.* Mayor of Ann Arbor, 26 Mich. 325); or that it may mean a room for the reception of company, or for an exhibition of works of art, etc. State *v.* Mansker, 36 Tex. 364. This latter idea shows how high-toned Texan judges are, and that they have traveled in foreign parts.

Neither an inclosed park of four acres in extent, nor an uninclosed and uncovered platform, erected for the votaries of the terpsichorean art, and where lager beer is sold, can rightly be considered a "saloon," or a "house," or "building," within the meaning of the Connecticut statute forbidding Sunday selling of intoxicating liquors, etc. State *v.* Barr, 39 Conn. 41.

We opine that the Texas court would have held both this park and platform a "saloon," as there would certainly be "room for the reception of company," and if the dancing was good, and the dresses of any worth, these would be an exhibition of works of art.

A "cellar" may be referred to as "the above-mentioned house." Com. *v.* Intoxicating Liquors, 105 Mass. 181.

In England it was held that a covenant not to use a house as a "beer house" was not broken by the sale under a license of beer by

retail to be consumed off the premises. L. & N. W. Railway Company *v.* Garnett, L. R. 9 Ex. 26. One Schofield had a license to sell beer, "not to be drunk on the premises," the bartender handed a mug of beer through an open window in Schofield's house to a thirsty soul, who paid for it, and immediately drank it standing on the Queen's highway, but as close as possible to the window; the Court of Queen's Bench considered that this was not a case of selling beer "to be consumed on the premises." Deal *v.* Schofield, L. R. 3 Q. B. 8.

As to the "thing" itself. The phrase "spirituous liquors" does not include "fermented liquors." State *v.* Adams, 51 N. H. 568.

Cider is not a "vinous liquor." Feldman *v.* Morrison, 1 Ill. App. 469. This seems reasonable enough in view of the decision that "vinous liquors" means liquors made from the juice of the grape. Alder *v.* State, 55 Ala. 16.

A "dram" in common parlance, in Texas, means something that has alcohol in it—something that can intoxicate; at least so say the judges. Lacey *v.* State, 32 Tex. 227.

Some years ago in Indiana they were very virtuous, and the court decided that the opinion of a witness that common "brewer's beer" was intoxicating was not sufficient to prove that it was so, unless the testimony of the witness was founded on a personal knowledge of its effects, or of its ingredients, or mode of manufacture; and the court could not take judicial notice that it was intoxicating. Glaso *v.* State, 43 Ind. 483.

But alas for the good old days and the childlike innocence of judges and jurymen! Now both courts and juries in that State will take notice of the fact that "whisky" is an intoxicating drink without any proof. Eagen *v.* State, 53 Ind. 162.

In Massachusetts a jury was held warranted in finding "ale" to be intoxicating, merely on the testimony of a witness who saw and smelled but did not taste it. Haines *v.* Hanrahan, 105 Mass 480. Perhaps these twelve men, good and true, had had a view themselves.

In Maine one may be indicted and convicted for selling for tippling purposes "cider and wine," although made from fruit grown in the State, if the jury find that they are intoxicating. State *v.* Page, 66 Me. 418.

How much and how long would it take the jury to find this out? Would they be allowed to take specimens with them into their drawing-room, as they do documents, to examine? Or would the judge look upon cider and native wine as Mr. Justice Creswell did upon water? A counsel once objected to a jury having water while considering their verdict. "Why not, Mr. ——, why not?" queried the judge, "water is neither 'meat' nor 'fire,' and no sane man can say it is 'drink;' let the jury have as much as they want."

The "Sabbath night" includes as well the time between midnight

on Saturday and daylight on Sunday, as the time between dark on Sunday and midnight. Kroer *v.* People, 78 Ill. 294.

In England "habitual drunkenness" is not cruelty in the eye of the law (N. B.—'Tis strange that justice should be blind and law a Polyphemus), so as to entitle a wife to divorce. L. R. 1 P. & M. 46.

As to the mode of selling, Richards, C. J., thought that selling a "bottle of brandy" for $1.25 was selling by retail. Reg. *v.* Durham, 35 U. C. R. 508. And in another case Haggerty, C. J., said that he would assume that a sale of a "bottle of gin" at sixty cents was a sale by retail. Reg. *v.* Stracham, 20 C. P. 184. While in Illinois the court held that proof that intoxicating liquors were retailed "by the drink" warranted a finding that the sale was in "no larger quantity than a quart" (as restricted in the Ill. Rev. Stat. 1845). Lappington *v.* Carter, 67 Ill. 482. See also United States *v.* Jackson, 1 Hugh 531. The judges of this court clearly never heard of the Duke of Tenterbelly. Bishop Hall tells us that this famous nobleman, when returning thanks for his election, took up his large goblet of twelve quarts, exclaiming should he be false to their laws, "Let never this goodly formed goblet of wine go jovially through me," and then, says the historian, "he set it to his mouth, stole it off every drop, save a little remainder, which he was by custom to set upon his thumb's nail and lick it off, as he did."—Law Notes.

IN VACATION.

"If you are skilled in some particular pursuit, we shall be glad to permit you to follow it," said the warden kindly to the newly arrived prisoner.

"Thank you, very much," replied the convict, politely, "I'm an aviator."—Judge.

A One-Sided Quarrel.—"You admit you overheard the quarrel between the defendant and his wife?"

"Yis, sor, I do," stoutly maintained the witness.

"Tell the court, if you can, what the husband seemed to be doing."

"He seemed to be doing the listening."—Argonaut.

Saying too Much.—Commenting on the many and varied excuses offered for evading the draft, Provost Marshal-General Crowder remarked that most of the would-be slackers come to grief through talking too much.

"They remind me of the young fellow who, on the spur of the moment, asked a girl to marry him.